FILED BY CLERK
SEP 28 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JACK GABRIEL CRUZ, Appellant.	2 CA-CR 2011-0350 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20102303001

Honorable Christopher C. Browning, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz,
and Diane Leigh Hunt
Tucson
Attorneys for Appellee

Law Offices of Christopher L. Scileppi, P.L.L.C.
By Christopher L. Scileppi
Tucson
Attorneys for Appellant

H O W A R D, Chief Judge.

¶1 In this appeal from his convictions for possession of a narcotic drug and drug paraphernalia, Cruz argues the trial court erred in denying his motion to suppress evidence of his statement to a police sergeant, claiming it was obtained in violation of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). He further contends the court erred in denying his motion to reinstate the state's previous plea offer, or alternatively, to preclude the state's scientific evidence. Because we find no error, we affirm.

Factual and Procedural Background

¶2 "In reviewing the denial of a motion to suppress evidence, we consider only the evidence that was presented at the suppression hearing, which we view in the light most favorable to sustaining the trial court's ruling." *State v. Kinney*, 225 Ariz. 550, ¶ 2, 241 P.3d 914, 917 (App. 2010). South Tucson Police Department officers responded to a report of a fight involving knives and guns, with "possibly one subject down." Once officers arrived on the scene, they noticed five individuals standing beside a truck. The officers approached the truck with their weapons drawn, instructed the individuals to sit on the ground with their hands up, and frisked each individual. One of the officers walked around the truck to ensure no other individuals were inside it, and he observed the passenger side door was open and a plastic bag containing what appeared to be cocaine was on its passenger seat. At this point, the individuals were sitting on the sidewalk, speaking with officers. The individuals were not in handcuffs, and officers did not have their guns drawn. A sergeant asked the entire group to whom the cocaine belonged, and Cruz admitted the cocaine belonged to him. This interaction took less than two minutes.

Officers arrested Cruz for possession of cocaine and transported him to the South Tucson Police Station for questioning. Once at the station, an officer read Cruz his rights as required by *Miranda*, and Cruz again admitted he owned the cocaine.

¶3 Before trial, Cruz moved to suppress statements he made before being read the *Miranda* warnings, claiming his constitutional rights were violated because he had been in custody when first questioned about the cocaine. The trial court denied his motion, finding Cruz had not been in custody at the time he was questioned first and, therefore, his rights were not violated. It further found Cruz's second admission after he received his *Miranda* rights was not a product of his first admission and would be admissible even if the first were not.

¶4 Cruz subsequently was tried and convicted of possession of a narcotic drug and possession of drug paraphernalia, and the trial court placed him on concurrent terms of probation, the longer of which was four years. Cruz appeals from these convictions.

Motion to Suppress

¶5 Cruz argues the trial court erred by admitting his statement to the police sergeant, asserting he made it after he had been subjected to custodial interrogation in violation of his constitutional rights under *Miranda*. He contends the court erred in concluding he was not under arrest when he first admitted the cocaine was his.[1] We review the denial of a motion to suppress for an abuse of discretion. *State v. Zamora*, 220

[1]Appellant's counsel cites an unpublished decision from a California court as persuasive authority. That is not allowed. *See* Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24. Any further violations of this rule will result in the imposition of sanctions.

Ariz. 63, ¶ 7, 202 P.3d 528, 532 (App. 2009). In doing so, "[w]e defer to the trial court's factual findings that are supported by the record and not clearly erroneous," *State v. Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d 303, 307 (App. 2000), but "to the extent its ultimate ruling is a conclusion of law, we review de novo," *Zamora*, 202 Ariz. 63, ¶ 7, 202 P.3d at 532.

¶6 First, Cruz has not challenged the trial court's finding admissible his second admission of ownership of the cocaine, which occurred after he was given the *Miranda* warnings, even if the first admission was not. Therefore, evidence of the first admission was merely cumulative and any error in the court's having admitted it was harmless. *See State v. Fulminante*, 161 Ariz. 237, 245, 778 P.2d 602, 610 (1988) (admission of evidence harmless if cumulative to other legitimately admitted evidence establishing defendant's guilt beyond reasonable doubt).

¶7 Second, Cruz also has failed to establish that the trial court abused its discretion in refusing to suppress his first statement. A police officer has authority to detain and question a person without administering *Miranda* warnings if the officer has a reasonably articulable suspicion of criminal activity. *State v. Pettit*, 194 Ariz. 192, ¶ 15, 979 P.2d 5, 8 (App. 1998). *Miranda* warnings are only required once a person is subjected to "custodial interrogation." *Miranda*, 384 U.S. at 444; *see also Oregon v. Elstad*, 470 U.S. 298, 309 (1985) (*Miranda* warnings required only after person taken into custody or freedom otherwise "significantly restrained"). "Neutral, nonaccusatory questioning in furtherance of a proper preliminary investigation is permissible under

Miranda." *Pettit*, 194 Ariz. 192, ¶ 16, 979 P.2d at 8; *see also Florida v. Bostick*, 501 U.S. 429, 434-35 (1991) (police may ask general questions of person not in custody without giving *Miranda* warnings).

¶8 The objective test used to determine whether an interrogation is custodial "is whether under the totality of the circumstances a reasonable person would feel that he was in custody or otherwise deprived of his freedom of action in a significant way." *State v. Carter*, 145 Ariz. 101, 105, 700 P.2d 488, 492 (1985). In making this determination, courts may consider whether objective indicia of arrest are present; the site of the questioning; the length and form of the investigation; and whether the investigation had focused on the accused. *State v. Stanley*, 167 Ariz. 519, 523, 809 P.2d 944, 948 (1991); *but see Stansbury v. California*, 511 U.S. 318, 324-25 (1994) (an officer's knowledge or beliefs bear upon custody issue only if conveyed by word or deed to individual questioned and such beliefs affect how reasonable person would gauge breadth of freedom of action). Additionally, in the context of roadside investigative questioning, the interrogation becomes custodial for purposes of *Miranda* only when "police have both reasonable grounds to believe that a crime has been committed and reasonable grounds to believe that the person they are questioning is the one who committed it." *Petitt*, 194 Ariz. 192, ¶ 15, 979 P.2d at 8.

¶9 Viewing the evidence in the light most favorable to upholding the trial court's findings, *see Rosengren*, 199 Ariz 112, ¶ 9, 14 P.3d at 307, Cruz stated the cocaine belonged to him after a sergeant asked the group of five individuals seated on the

sidewalk to whom the cocaine belonged. The sergeant did not direct the question specifically at Cruz. Further, no evidence suggests the sergeant who asked the question had reasonable grounds to believe the cocaine belonged to Cruz and not one of the other four individuals present. The entire encounter was brief, less than two minutes, and took place in a public area. Cruz was not in handcuffs or otherwise physically restrained. Because reasonable evidence supports the court's finding that Cruz was not in custody when he admitted ownership of the cocaine and *Miranda* warnings were unnecessary, the court did not abuse its discretion in denying his motion to suppress.

¶10 Cruz additionally argues that because his freedom of movement was restricted by the officers, he was in custody even if the officers had not arrested him. But the United States Supreme Court has stated "the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody." *Maryland v. Shatzer*, 130 S. Ct. 1213, 1224 (2010). Thus, even if a reasonable person in Cruz's position would feel he was not free to leave the sidewalk, no other objective indicia of arrest were present. Cruz states he was "approached by three officers at gunpoint and taken to the ground," but the evidence presented at the suppression hearing established Cruz was seated on the sidewalk after being "asked to have a seat" and officers only had their guns drawn when they approached the group to investigate reports of a fight involving guns and knives.

¶11 Cruz also contends, without support, that the trial court erred by applying the four factors indicative of custody our supreme court applied in *State v. Stanley*,

because he argues "[t]he facts in [his case] are incredibly divergent from the facts in *Stanley*." 167 Ariz. at 523, 809 P.2d at 948. Cruz is mistaken, however, because courts examine the circumstances of each case in determining whether an individual is in custody for *Miranda* purposes, *see State v. Cruz-Mata*, 138 Ariz. 370, 373, 674 P.2d 1368, 1371 (1983), and *Stanley* did not limit the factors for determining custody to the facts of that case, *see Stanley*, 167 Ariz. at 523, 809 P.2d at 948. Because the trial court did not abuse its discretion in determining from the totality of the circumstances that Cruz was not in custody, Cruz was not subjected to custodial interrogation in violation of *Miranda* and, therefore, the court did not err in denying his motion to suppress.

Motion to Reinstate Plea or Preclude Evidence

¶12 Cruz further argues the trial court erred when it refused to either reinstate the plea offer the state previously had made or, alternatively, to preclude admission of laboratory testing results in his trial, after the state failed to disclose the results before his plea deadline in violation of Rule 15.8, Ariz. R. Crim. P. He contends knowledge of the test results would have materially impacted his decision to accept or reject the plea agreement. We review a trial court's ruling on a Rule 15.8 motion for an abuse of discretion, and will affirm if supported by reasonable evidence. *See State v. Jackson*, 208 Ariz. 56, ¶ 42, 90 P.3d 793, 804 (App. 2004). We defer to the court on issues of credibility, which it is in a better position to assess. *State v. Olquin*, 216 Ariz. 250, ¶ 10, 165 P.3d 228, 230 (App. 2007).

¶13 Rule 15.8 requires, at a defendant's request, preclusion of evidence not disclosed by the state at least thirty days before a plea offer's deadline if the court determines the evidence "materially impacted the defendant's decision" to accept or reject a plea offer and the prosecutor refuses to reinstate the plea. Before trial, Cruz rejected the state's plea offer based on the disclosure then available to him. That disclosure consisted of a "narco pouch" field test confirming the bag of white powder, which he claimed ownership of on the scene, was cocaine, as well as his own admission that the substance was cocaine. Weeks after Cruz rejected the plea offer, the state disclosed test results confirming the substance found in Cruz's possession was cocaine. Cruz moved the trial court under Rule 15.8 to either reinstate the plea offer or preclude this evidence, arguing the state improperly disclosed the evidence after his plea agreement deadline and the disclosure "would have [had] a material impact" on his decision to accept or reject the plea. The court denied his motion, finding "the lab results would not have reasonably and materially impacted [Cruz]'s decision to accept or reject the plea."

¶14 Cruz argues absence of this disclosure was critical to his decision to accept or reject the plea because his counsel advised him "his confession was not proof that the substance was in fact cocaine." But the test results would have been cumulative evidence of the nature of the substance involved which would have undermined any argument "that the substance could not be proven to be cocaine." The trial court found the nature of the substance never had been in dispute, and the "narco pouch" test and Cruz's

admission could have proved the substance was cocaine. Therefore even in the absence of the test results the state had sufficient evidence to prove the substance was cocaine. The court rejected Cruz's and his counsel's argument, unsupported by affidavits or testimony, that the test results were material either to his counsel's advice or Cruz's decision to reject the plea. *See Olquin*, 216 Ariz. 250, ¶ 10, 165 P.3d at 230 (trial court judges credibility). Under these circumstances, we cannot say the court abused its discretion in denying Cruz's motion.

Conclusion

¶15 For the foregoing reasons, we affirm Cruz's convictions and probationary terms.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed August 15, 2012.